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IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

In appellant's opening brief, it was urged that the statute here, as construed and applied, violated free speech and press because it establishes such unconfined and vague standards as to vest censorial powers in officials of government, authorizing them in their arbitrary discretion to punish or permit the exercise of these fundamental freedoms protected by the First and Fourteenth Amendments.

The appellee has failed to meet this crucial issue. Far from discussing the question of the breadth and scope of this state law as applied to art and literature, and its validity under the Constitution in the light of history and

precedent, appellee in its brief virtually concedes that it is unable to justify the statute on this basic score.

Thus, with only a passing reference in a footnote, appellee rejects the settled construction of this "mental obscenity" statute by the California courts as "pure dictum," as neither a "construction" nor an "interpretation." As we demonstrate hereafter, the appellee is quite in error. The appellee is compelled to take this unsupportable position because it is plainly impossible for it to maintain that a statute which makes it a crime to write, publish or distribute any book which "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire" is not a thought statute, so broad and unconfined as to vest censorial powers unconstitutionally in officials of government.

The expedient gloss which the appellee now attempts to place upon these proceedings only accentuates the infirmities inherent in this "obscenity" statute. On the one hand, the appellee attempts to reconstruct the legislation in such manner as to only deepen the indefiniteness and limitless scope of the law. The appellee affirms that the "obscenity" law is directed not only at any book which stimulates readers "erotically," but at books which cause the readers to react with "repulsion and disgust" (A. B. 22.)* Thus, appellee's improvised construction of the law would punish not only books which inculcate sexually "impure" thoughts or desires, but those which offend the tastes of their readers. Such an arbitrary and vagrant standard would again place virtually all of art and literature at the mercy of every "village tyrant." That

*We thus refer to the brief for the appellee.

the statute as thus construed would offend the provisions of the Fourteenth Amendment appears plain. But what appellee has succeeded in doing is demonstrating how these "mental obscenity" statutes do operate in practice, for prosecutors, judges and juries are really unable to decide what writing or print will incite a "lascivious" thought or "lustful" desire. All that they can decide is that they "don't like it."

On the other hand appellee attempts at other places in its brief to treat the statute here as if it were some narrowly drawn statute where defined criminal conduct had been made an ingredient of the offense; where the class of readers has been limited; and where the type of utterance, specifically delineated, had been brought into immediate nexus with the proscribed conduct. The initial difficulty with appellee's position is that that is not the statute here, neither on its face nor as construed and applied. Moreover, appellee's argument is solely abstract and shot-gun in character, pointing in all directions at one and the same time without establishing the specific application of the concepts it enunciates to the particular law or charge under which appellant was convicted.

Thus, appellee speaks of the "strong presumption of constitutionality" (A. B. 19) without relating this supposed concept to the question of a state law avowedly abridging the exercise of speech and press. Appellee urges respect for the "legislative findings of fact" (A. B. 19), without explaining how *Butler v. Michigan* could have been written in the light of appellee's argument, and without discussing how the broad and vague censorial terms of this little Comstock statute enacted in the middle of the 19th Century can be today held compatible with the pro-

ten by Dr. Nicolas Venette in 1688, entitled *Tableau de l'Amour Conjugal, ou la Generation de l'Homme.* By 1712, this work was already in its 9th edition. There was an edition put out in Amsterdam in 1745, another in 1778, and a French edition appeared as late as 1924. We have appended to this brief a copy of the translator's foreword and the author's preface which appear with the treatise. They speak for themselves, as do the contents of this scientific treatise written by a devout and principled scholar on a subject of the highest importance to mankind.

Related observations could be made about the writings of Dr. D. O. Cauldwell,* which the trial court itself stated were not obscene [R. 88], but which appellee insists are "very obscene." "She Makes It Pay" [Ex. 9; R. 36, 64] is a study of the psychological inhibitions built up in a man during his life, so as to prevent him from engaging in normal sex relations. "Witch on Wheels" [Ex. 9; R. 36, 64] is the story of a promiscuous woman who threw in her lot with a notorious gambler, only to find with his death that she had lost both the man she loved and the chance to start anew. "Sword of Desire" [Ex. 11; R. 38, 64] is the story of the sexual methods used and the aid given to a legislative committee by a psychiatrist in uncovering a vice ring [R. 90].

It is submitted that the case herein demonstrates, if no other evidence were available, the vice of the censorial statute here involved.

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*"Questions and Answers About Oragenital Contacts" and "Petting As An Erotic Exercise" [Ex. 5; R. 27-28, 64].

visions of the Constitution and this Court's recent interpretation thereof, whatever may have been the motives or the assumed "findings" of the legislators. Appellee speaks of the concept of "clear and present danger of criminal conduct" (A. B. 19), without showing how this question of law is involved in this statute or in these proceedings, and without defining what "criminal conduct" is envisaged or what "obscene matters" present a "danger" of such conduct (A. B. 19).

Proceeding in another direction, appellee argues that the writing, publishing and sale of books which arouse "lustful desire" or "lascivious thoughts" are properly punishable, "entirely aside from the matter of inciting the user to overt sex crimes" (A. B. 26). The reasons given for this position are first, that "most women" are repelled and disgusted with such books (A. B. 22); second, that "some men" with "cultivated standards of a degree of nicety" are also repelled (A. B. 22); third, that a "child" reacts with "extreme shock and terror" (A. B. 22); and fourth, that the "vast majority of parents" do not wish their children exposed to "it," but react with "extreme displeasure if the possibility of such contact occurs" (A. B. 24). Thus, at one and the same time, appellee struggles to inject "clear and present danger of criminal conduct" into the proceedings, and then labors with equal vigor to remove all elements of unlawful conduct from the case in order to enlarge "obscenity" to include "bad taste" as well as "sexually impure ideas." Aside from the fact that this statute is not limited to "women" or "children" or "parents"; aside from the patent constitutional invalidity of appellee's argument on either term, it is submitted with all due deference to appellee that the standards which society at large sets

for the viewing of art or the reading of literature cannot be measured by the standards of "parents" or "children" or other segments of the population. Society has an interest in freedom of expression which may not necessarily be shared by the family or other individual groups.* We question, of course, the validity of appellee's conclusions as to the reactions of adult readers, or young people, to the reading of erotic literature. The widespread acceptance, reading and viewing, as well as discussion, of sexual matters in books, newspapers, magazines, television and motion pictures appear to indicate more wholesome and tolerant reactions than appellee would allow, even if appellee's conjectures were legally relevant here.

Finally, proceeding in a third direction, appellee urges that the history of the past should be disregarded, that however critically harmful to society has been the vague and unconfined standard which this statute now embodies, still as long as "courts sit" it need not be feared that the same standard will be misapplied; that indeed the standard is now "workable" and American courts make the standard applicable to "works of pornography" only and never to "works of any literary value" (A. B. 37); and that in any event, in this particular case, no injury has been done for the "degree of obscenity" (A. B. 49) of this material is so great that delicacy even forbids quotation

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*It is not uncommon for young people to do a great deal of reading of books which their parents are unable to prevent. It might be argued that "parents" should have the freest opportunity to peruse all literature so that they could more intelligently and pesuasively advise their children on the latter's choice of reading material. But the ordinary father or mother, *qua* such, is not qualified to act as censor within society at large, or to decide what literature or art may be displayed before the general public.

IV.

The Federal Government Has Preempted the Field of "Keeping for Sale by Mail" Alleged Obscene Literature.

Appellant's opening brief urged that Congress plainly intended to occupy the field of keeping for sale by mail of "obscene" books and advertisements, to the exclusion of the States (App. Br. 108-120). Appellee does not meet the issues presented (A. B. 62-64) and so we make no additional reply.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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Of Counsel.

"from exhibits to illustrate their indubitable obscenity" (A. B. 49).

But if the standard of criminality enunciated in a statute is incomprehensible, unconfined and indefinite, if the complaint is that judges and juries act under no legal standards at all, but simply enact legislation *ad hoc* in each case retroactively and without leaving any room for appellate review on the ultimate issue, it is difficult to understand how the fundamental rights of an accused will ever be protected by the judicial process. Courts can right wrongs when the defined standards of the law have been misapplied; they cannot legally undo harm which they have themselves been compelled to share by reason of the exercise of an arbitrary power vested in them by the legislature.* Moreover, as we demonstrate hereafter, it is simply not correct for appellee to assert that the censorship of works of literary merit has not occurred in modern times under the vague standards of "obscenity" statutes. The exact opposite is the case as appellee's own citations establish. Finally, while appellee cannot successfully contend that the particular application of the statute can save it from constitutional infirmity if it is otherwise invalid on its face and as construed, still appellant proposes to show how appellee even on this issue has been compelled by reason of its untenable position to distort the record and to cast the epithet of "obscenity" on books which have as much right, indeed importance, in the marketplace of ideas as any which appellee may deem "meritorious."

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*See *Roth v. Goldman*, 172 F. 2d 788 (C. A. 2, 1949) at 789.

I.

Unconfined and Arbitrary Censorship and Abridgement of Freedom of Speech and Press Are Not Valid or Reasonable Means for the Exercise of Alleged Police Powers of a State.

The statute here is not a *Chaplinsky* statute. Nor is it a statute regulating the sale of liquor or the height and weight of motor trucks on state highways. This is not a statute which purports to punish the commission of defined sexual offenses, or the incitement or coercion thereto. This is not a breach of peace or disorderly conduct statute which has been applied to utterances or writings immediately provoking injurious conduct. The statute here is limited solely to "obscene and lascivious thoughts and desires." The law as construed would apply to virtually every book and work of art and the sole criterion is the effect of such art and literature on the minds of readers and viewers as a judge or jury may conjecture, be such readers or viewers "adults," "parents," "children," "men" or "women." The law is as long as it is wide, and the sole issue here is whether *such a law* can, consistent with the Constitution, be upheld as a valid exercise of the police power of a State.

The appellee has been unable to produce a single precedent from this Court's decisions which supports the view that under the guise of protecting "the order, safety, health, morals and general welfare of its citizens" (A. B. 11), a State may establish a broad system of censorship and without restraint limit the exercise of speech and press. Appellee cannot do so because the decisions of this Court in such cases as *Stromberg*, *Cantwell*, *Thornhill*, *Carlson*, *Largent*, to name only a few, point in the op-

posite direction (App. Br. 75-76, n. 27).* "Where the First Amendment applies, it is a denial of all governmental power in our Federal system." Mr. Justice Frankfurter, concurring in *Marsh v. Alabama*, 326 U. S. 501, 511.

Appellee strings together a series of arguments to support its view that the legislature may reasonably have concluded that books which arouse "lustful desire" or incite "lascivious thoughts" present a clear and present danger of "resulting criminal conduct" (A. B. 17). Thus, it is urged that despite all of the known scientific authority which questions the causative influence of books on "sexually impure" ideas or acts, still there are some who hold a contrary view; that unless the legislature is "clearly wrong," its enactments must "strongly [be] presumed to be constitutional" (A. B. 18); that the existence of "obscenity" statutes in 47 states itself shows that there must exist facts warranting the conclusion of the state legislature that the "uncontrolled and unrestricted distribution and sale" of "obscene" material would lower the "moral standards of its populus and would directly affect a substantial number of its citizens" (A. B. 12-13); and that this Court cannot take "judicial notice" of any contrary view by scientific authorities unless they are in substantial agreement (A. B. 20).

But if it be assumed that all which appellee maintains aforesaid cannot be questioned, and that the legislature has "found" everything which logic and science may deny, still appellee has made not the slightest effort in its entire brief to support the validity of this broadly construed statute, with its wide interdiction of art and

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*We thus refer to Appellant's Opening Brief.

such circumstances and, being evicted from the genitalia, take up its residence in the mouth. Not what one did but what one said was the mark of decorous gentlefolk, and in the realm of sex this distinction was of course emphasized enormously.

For centuries the Church had taken it upon itself to tell the people exactly what they should do, or more often what they should *not* do, in matters sexual, basing its dicta for the most part on the maunderings of some feeble-minded eunuchoid old men of bygone times who either had been disappointed in love, too chicken-hearted to take a try at it, or physically incapable of indulging in it. Happy, as always, to have its thinking done for it, the law for the most part took over, with an enormously verbose lack of criticism, the findings of the Church on sex matters and enforced them with a severity and invariability possible only where intelligence is completely lacking.

But to these two long-standing, all-powerful, and utterly dogmatic vested interests was being added a third authority—that of science. Religion, science, and jurisprudence (law in its origin having largely been a matter of divining the guilty one and assessing an appropriate penalty) are all children of primitive magic, and by the 17th century none of them had got far from mother's apron-strings. The ducking-stool, the trial by combat, the chastity tests, and the like that the law employed to discover guilt were just as magical as the mumbled incantations and crucifix-amulets that the Church employed to drive off the Devil and the philtres that the doctors hopefully administered to cure impotence.

For any real progress, it was apparent that science, and medicine as part of it, had sooner or later to break with

literature. No state legislature can exceed constitutional limitations in the exercise of its police powers. However much a legislature may be convinced that "evil" exists, it cannot enact legislation allegedly designed to deal with the narrow evil by broadly and unconfinedly depriving persons of their fundamental freedoms. If appellee's position be sound, that all state "obscenity" statutes must be held constitutionally valid, no matter how broad, simply because the legislature must be deemed to have found facts warranting the enactment of the statutes, then *Butler v. Michigan*, 352 U. S. 380, could not have been written. The Michigan legislature may have "found" that "obscene" literature sold to an adult would find its way to young people who might be "corrupted," but that did not justify a law punishing the sale of any book containing "obscene" language to an adult, simply because the book would have a potential effect on a youthful reader. The reason why such statute could not be justified as an exercise of the police power of the State was because it would thereby arbitrarily curtail "one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler v. Michigan, supra*, at 384. Nor indeed, on appellee's terms, and in other related fields, could have *Winters*, *Burstyn* or *Thornhill* have been written.

In fact, appellee cannot support its position here without finally being driven to take the view that all books which incite "lascivious thoughts" or arouse "lustful desire" are punishable as a "legitimate exercise of the police power" because they are "disgusting," "repulsive" and "frightening" (A. B. 22-24). Appellee makes it clear that the

its brothers. An error insisted upon may serve religion, or enforced may serve law, but it can never be made *true* for science. But the break was difficult in the extreme. The dogma of centuries cannot be thrown off in a few years—indeed, it is far from completely thrown off to this day. The only thing that can take the place of dogma is observation and interpretation of experience, and this of necessity comes slowly. Also, such a break with establshed authority was dangerous, for scientists are men, and usually solitary men with no powerful associations, who may be drawn and quartered or burned at the stake for letting their thinking stray too far from the regimented line, and this again made scientific progress exceeding y slow and cautious.

Toward the end of the 17th century the picture was somewhat altered. With none too good grace the Church had conceded that the Earth was round and grudgingly admitted that perhaps the stars and sun did not revolve about it after all. Scientists were patiently advancing their groping theories and living to tell about it. But on the science of sex the Church did *not* relax its stand, and has not to the present, and in this it was pretty thoroughly abetted by the formalized prudery and innate sex-shyness of the majority of the people, those who had most to gain personally by advances in the field. Many sex offenses were still being punished (and on slight evidence in many instances) by the Biblical penalty of death by fire, and sober judges seriously pondered over charges that certain children were the offspring of the cohabitation of a demon with its mother! Indeed, one cannot help wondering that if, in the dim future, enlightenment might ever draw close to completion, which would be the final refuge of superstition, religion or sex?

statute is not directed at conduct, or utterances which directly coerce or incite to such conduct. It emphasizes that it puts to one side "the matter of inciting the user to overt sex crimes" (A. B. 26). The end result is that we have here, on appellee's own terms, the broadest and vaguest form of censorial statute. The standard is so indefinite and incomprehensible as to make possible the arbitrary abridgement of speech and press in totally unfettered fashion. The overhanging threat to freedom inherent in this statute is made palpable by appellee itself.

That such a statute with such a standard offends the Constitution can hardly be doubted, it is respectfully submitted. That the statute is perforce unreasonable and arbitrary would appear to be a necessary corollary. Appellee itself concedes that the "evil" which it seeks to prevent—acts or thoughts of sexual misbehavior caused by the reading of books—has little scientific support. Indeed, it cites not a single authority specifically supporting its view (*Cf.*, App. Br. 64-70). Reliance on the presence of other state "mental obscenity" statutes overlooks the common background of these laws, stemming as they did from the mid-Victorian era of the 19th Century without common law or early American experience (App. Br. 54-61, 85-87). Moreover, appellee overlooks the more contemporary decisions of this Court broadening and deepening the significance of the constitutional guarantee of freedom of speech and the press (App. Br. 62-63).

As against this tenuous and insubstantial "evil" as predicated by appellee should be balanced the wide inroads which a statute such as the one herein can and does make in the fields of literature and art, in thoughts, ideas, opinions and beliefs upon the free circulation of which depends the security of the nation (App. Br. 101-107).

Onto this scene came our good friend Dr. Nicolas Venette, a solid citizen of the town of La Rochelle and Regius Professor of Anatomy and Surgery, and Dean of the Royal College of Physicians at Rochelle. Venette was not only an indefatigable reader and an ardent observer; but what is equally important he was a keen and penetrating thinker and subjected everything he read to shrewd interpretations and everything he saw to careful analysis, and constantly checked the one against the other. He respected the old authorities, but he did not worship them blindly, and never hesitated to match his own experience or experimentations against the findings when it seemed justified. His book abounds in the phrase, "My experience has shown me—," and often when he quotes some hallowed old authority or venerable Church Father he succinctly appends, "But this runs contrary to everyday experience." Venette stands out as one of the early practitioners of the objective scientific method.

But in addition Venette was courageous. Impatient with unfounded dogma of all sorts, his work soon led him to see how much greater amount of it there was in sexual subjects and how much harm it was doing not only to the health and happiness of the generality of the people, but also frequently it worked against the best interests of propagation, which was universally desired, by Church and State as well as the people. If we but reflect what a dubious business it is to this very day in our "enlightened" era if we undertake to write an educational book on sex, if we consider how much arbitrary power the Church can still bring to bear to suppress that book and jail its writer or publisher, we cannot but gape in amazed admiration of the temerity and purposefulness of Venette when he in his day determined to write his

By all existing constitutional tests, this statute cannot be upheld.

In this connection, appellee urges that the standard here is workable, "strictly limited to works of pornography and in no way applicable to works of any literary value" (A. B. 37). It would unduly lengthen this brief to furnish all the examples which prove appellee to be in plain error. See Haight, *Banned Books* (1955); and see, Appellant's Jurisdictional Statement, 16-21. We may, however, limit ourselves to some of appellee's citations to demonstrate the weakness of its argument, this without regard to the question whether a conceded censorship statute may stand because at any particular time the Censor fortuitously turns out to be "pretty broadminded." (*Cf., Thornhill v. Alabama*, 310 U. S. 88, 97-98.)

Take, for example, Erskine Caldwell's *God's Little Acre* which appellee notes was held not obscene in New York (A. B. 38, n. 18). In the very same note, appellee observes that under "the old 'deprave and corrupt' test of the *Hicklin* rule" (the same test as we have in these proceedings), *God's Little Acre* was held "obscene" in Massachusetts, 326 Mass. 281, 93 N. E. 2d 819 (1950). The book is a portrayal of the life of a poor white farmer and his family on a farm in Georgia. As a sociological document and as a sincere and serious work, the book has received widespread acclaim. See Judge Bok's comments on the same work in *Commonwealth v. Gordon*, 66 D. & C. 101, 107 (Pa., 1949).

In appellee's note, there is reference to Lillian Smith's *Strange Fruit*, held obscene under the same "workable" test. (318 Mass. 543, 62 N. E. 2d 840 (1945).) A recital of the character of the work, a study of race relations

and problems in the South, is contained in the court's opinion, *supra* at 846-847. The court agreed that the book was a "serious work" and assumed that its theme was "legitimate," that it was a work "of literary merit" and that it had been "favorably received by reviewers generally and widely sold to the public." *Supra*, at 847. But the book was condemned because it "had a strong tendency to maintain a salacious interest in the reader's mind and to whet his appetite for the next major episode." (*supra* at 847.)

Take the decision in *Hallmark Productions v. Mosley*, 190 F. 2d 904 (C. A. 8, 1951) (A. B. 45), where a serious lecture illustrated by a motion picture and booklets dealing with problems of sex hygiene, venereal diseases, sex relations, etc. came within the condemnation of the "obscenity" statute.

The early case of *United States v. Harmon*, 45 Fed. 414 (D. C. Kans., 1891), is another instance of a decision heavily relied upon by appellee (A. B. 27, 32), where the so-called "workable" rule was applied to a newspaper publisher who devoted columns in his newspaper to the "discussion of sexual relation, and a portrayal of its excesses and abuses." Particularly condemned was an article by a physician discussing instances falling within his professional experience dealing with abuses in coercive cohabitation between husband and wife. (*Supra* at 414.)

Unless a line is to be drawn between books that omit all references to sex and sex relations, and books that mention such matters, whether the discussion be realistic, scientific or otherwise objective, we are unable to understand appellee's contention that the standard here has been applied only to "pornography" and never to works "of

any literary value." We believe that the opposite is the case. Moreover, that the Censor, happily, was frustrated in some cases does not mean that the existing vague standard will not be misapplied as new or old situations arise, and the pervasive effect of such standard upon the thinking and writing of society in general cannot be overlooked. Very few persons enjoy being charged with "obscenity" even if they are eventually vindicated; it becomes better to avoid all "controversial" subjects respecting sex then endure such prosecutions. The greatest vice of censorship statutes is the self-censorship they engender in every thinking person.

II.

The Statute Deprives Appellant of His Liberty Without Procedural Due Process.

We have developed this argument fully in our opening brief (App. Br. 49-73), and appellee has made no real attempt to meet the issues there presented (A. B. 28-49).

The principal difficulty with appellee's position is that it is unwilling to discuss the statute here, as construed by the courts below. The question here is whether an accused can determine when a book will substantially tend to corrupt and deprave a reader by "inciting lascivious thoughts and lustful desire."

Appellee initially sets off to establish that the words "obscene," "indecent," "lewd," "salacious" and "terms of similar import" (A. B. 28) have some meaning. It asserts that "many cases" supply a sufficiently "clear and definite interpretation" (A. B. 29), when the courts almost unanimously themselves state that they are unable to define the terms. Then, immediately, appellee adds that the "definition of such terms, in their nature, change and

vary, dependent on the mores, ideals and customs of society at any given time" (A. B. 29). It depends states appellee, on the "community's current concept" (A. B. 29), without indicating what this "concept" is in the area of sex thoughts and desires. Appellee states candidly that scientists are far from agreed that books even arouse "lascivious thoughts" or "lustful desire" or cause sexual misbehavior, whatever such misbehavior may mean in appellee's view. Nor can appellee deny that no one, including a scientist, can ever identify what book at what time will incite "bad sex ideas." Indeed, appellee asks this court not to take "judicial notice" of scientific conclusions because no unanimity has been reached in the field.

Appellee asserts that "obscene" books are also "immoral" and "indecent" (A. B. 11); that "morals are not static . . . . but are like the vagrant breezes to which the mariner must ever trim his sails . . ." (A. B. 14). It concedes frankly that a "large segment of the population is not stimulated" "erotically by obscenity" (A. B. 22). The appellee points to an Illinois decision which reads as follows: "To the one who is about to engage in the sale of such pictures, the statute is clear as to what is prohibited. *His only problem is as to whether the pictures are obscene and indecent*" (A. B. 31; emphasis added). Frankly, affirms appellee, "the concept of obscenity remains elusive" (A. B. 44). The short of the matter is that appellee does not know any more than any accused as to what book will arouse a "lascivious thought," or when. The statute must, therefore, encompass virtually all books, and, according to appellee, the accused must wait for the jury to decide retroactively whether the books may see the light of day or not. It is at such time that the accused learns whether he has committed an act which

stamps him as a "sordid" purveyor of "salacity" imbued with an "avaricious desire to continue the flow of profits from the pennies of perverts" (A. B. 59), and relegates him to jail as a common felon. It is difficult to comprehend how all of this complies with the dictates of the Fourteenth Amendment.

Appellee posits another theory. It is asserted that there is a "black zone," "gray zone" and "white zone" of obscenity (A. B. 42-44). Literature which portrays "unnatural" sex acts is deemed by appellee in the "black zone" (A. B. 43), although it frankly concedes elsewhere in its brief that such literature does not generally arouse persons "erotically." We leave to one side the free speech aspects of appellee's position. In the "white zone" appellee asserts are "illustrations of women and men embracing or kissing" (A. B. 43), an enlightened view which unfortunately is not always accepted by courts and juries as appellee's own precedents indicate.* As to the "gray zone" here, asserts appellee, "an individual knows he must tread lightly," and whether the accused has "tread lightly" enough must necessarily be determined by the "triers of fact in the courts" (A. B. 43-44). Whatever may be the validity of appellee's "zone" theory in the area of perceived conduct or objective conditions, it is submitted that the theory cannot be employed in the area of the inner mind of man. Whether a book will arouse a particular thought or desire in the mind of a reader to the extent of substantially corrupting and depraving him is not a zoning problem; it is a problem which is inherently insoluble.

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*See also the trial court's view here that one of the books was "obscene" because it contained "references to sex", such as, "lingering kiss on her lips" [R. 89].

The appellee attributes to appellant the argument that it is "impossible" to frame a statute in the "obscenity" field (A. B. 46-48). That is appellee's version; not appellant's. We did assert candidly our belief that any statute limited only to books which arouse "lascivious thoughts" or "lustful desire" cannot be constitutionally drawn. On the other hand, appellant asserted that statutes narrowly drawn as to conduct or incitement, or particularly if narrowly drawn with respect to children would raise different problems. We asserted also that Judges Frank and Bok had suggested statutes narrowly drawn to reach conduct or its direct coercion or incitation which a State might have a right to prevent (App. Br. 43-44). Appellee here has made no attempt to demonstrate why it is not possible to draw a statute narrowly to meet constitutionally, the "evil" it seeks to prevent. It is appellee who is arguing that it is "impossible" to draw any statute in the "obscenity" field without establishing the broadest and vaguest standard to encompass all art and literature; without vesting censorial powers in agencies of government.

III.

The Case Here Illustrates Graphically the Vice of This Censorial Statute.

A discussion of the particular application of the statute requires first that the posture of the case be correctly presented, and second, that the exhibits involved in the case be dispassionately examined.

Initially, it is fruitless for the appellee to attempt to avoid the decision in *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853 (A. B. 56, n. 33). The decision was relied on by the court below [R. 20], was written by the same court, and, indeed, is the authorita-

tive decision in the "obscenity field." The issue of the construction of the provisions of the "obscenity" statute was directly involved in *Wepplo*, and a new trial was granted in the case only because of an error in the rejection of evidence. The construction of the law was not "dictum," but precisely declared "law."* The *Wepplo* construction of the statute was also relied on by the trial court here [R. 83-88]. Thus, both the trial and appellate courts followed the same construction of the statute under which appellant was convicted. Any attempt now to justify the judgment here under some differently improvised statute would mean conviction under a charge not made and a sheer denial of due process. (*De Jonge v. Oregon*, 299 U. S. 353, 362; *Cole v. Arkansas*, 333 U. S. 196.) In fact, appellee is relying on the "lascivious thought" and "lustful desire" construction of the statute; it simply has sought to extend the statute to include the standard of "bad taste" as well, because in appellee's view that is the only way it can make the statute "workable."

Secondly, we desire to demonstrate how this case was ultimately limited to a consideration of the books alone by the appellate court. The prosecution was initiated by a raid on appellant's business premises which resulted in the seizure of hundreds or thousands of books, magazines, brochures, pictures, letters, labels and other related material [R. 14-18]. From all of this welter of material, the prosecutor selected that which he considered violative of the statute, lumped the material together in various

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*The Appellate Department does not render too many written opinions because of the great number of cases which come before it. When it does write an opinion, as in *Wepplo*, it does so because it recognizes a duty "to declare the law" for the guidance of more than eighty municipal court judges. [R. 22-23.]

exhibits, and introduced them into evidence [R. 26, 27, 28, 29, 32, 36, 37, 38, 39, 40, 49, 52, 53, 55, 64]. The trial court then ruled on the evidence [R. 80-94], found some of the books and pictures to be "obscene" and others not. It also found that many of the exhibits had not been "kept for sale," a requirement of the statute, and dismissed them from consideration [R. 90, 92].

On appeal those books which the trial court found not to be obscene,* the appellee argued were obscene. As to the books which the trial court held obscene, the appellant argued to the contrary and urged also that the proof did not establish that the books were "kept for sale" [R. 15]: As to the pictures which the prosecutor believed to be "very obscene," these the trial court had excluded from the case as not "kept for sale" [R. 14, 92]. The remaining pictures on appeal the prosecutor described as only "moderately obscene" [R. 13-14], thus impliedly conceding that views might differ as to whether they were or not. Appellant on the other hand urged, in addition to all other arguments, that the statute and charge covered only "preparation" of pictures [R. 1], and concededly appellant had not been shown to have so prepared or otherwise drawn the pictures. Appellee argued for a broader construction of the law.

Pressed between these arguments the court below limited its opinion "simply" to "obscene books" [R. 19-21]. As we indicated in the Statement of the Case (App. Br.

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*[People's Ex. 5; R. 25-26, 64, 86-88.] Appellee now argues that the trial court so held at "12:00 o'clock noon", but may have changed his mind when the guilty verdict was rendered at "3:55 p.m. of the same date" (A. B. 53). This bit of mind reading is not a legally supportable position, and, in fact, at "3:55 p.m.", the trial court stated that he had not "altered" the position "expressed when the People rested" [R. 117].

12), the court failed to indicate which books were the basis of the conviction merely stating that some of the books were undoubtedly obscene [R. 21; App. Br. 71, n. 24].

Thirdly, as to the books themselves: On appeal, the court below requested the appellee to present a written evaluation of all its evidence, indicating that which it considered obscene and that which it considered not obscene. An "Analysis of Exhibits" was presented [R. 12-14]. At least twenty-three different books, magazines and pictures were now conceded by the appellee to be not obscene [see, "Answer to Analysis," R. 14-18]. Others were held to be moderately "obscene"; some "very obscene" [R. 12-14].

The matter comes down to about six books which appellee maintains are "very obscene." Space does not permit extended comment upon these books, but appellant submits that a reading of each of these writings will indictate (1) that it is simply irrational to urge that anyone should know these books arouse "lascivious thoughts" in a reader to the extent of corrupting and depraving him; (2) that these books are scientific and literary material protected fully from suppression by the fundamental law; (3) that the ideas contained in these works are important and should be known and considered by those who wish to know and consider them; and (4) that by designating these works as "pornography" and "hard core obscenity," the appellee has made crystal clear the vagueness and limitless scope of the statute here involved.

Of the books designated as "very obscene" by appellee, one of them is "The Picture of Conjugal Love" [Ex. 5; R. 27-28, 64], published by the Haldeman-Julius Publications in 1948. The book is a translation of a work writ-

APPENDIX.

(From Exhibit 5 [R. 27-28, 64], Which Appellee Designates as "Very Obscene" [R. 13]).

The Picture of Conjugal Love

Being a Translation of the Tableau de l'Amour Conjugal, ou la Generation de l'Homme.

By Dr. Nicolas Venette.

Translated and Edited by A. F. Niemoeller.

Translator's Foreword

To attempt at this late date to laud the courage and acumen of old Nicolas Venette or to estimate the importance of his *Tableau de l'Amour Conjugal* in the history of sexual science and its slow and laborious development of a sound literature, would not only be a waste of time but highly presumptuous as well.

In the 17th century, when Venette lived, the spark of objective science burned but feebly and many adverse winds blew strongly to extinguish it with but few favorable breezes to fan and encourage it. It was an age of rampant superstition with the folk and religious beliefs of pagan times that had been preserved and altered during the Dark Ages being heavily dogmatized by Church, law, and science. The price of disbelief or even of question was often still torture or perhaps death, and in most instances legal penalty and social ostricism. License and libertinism were common but, as is always the case with narrow and self-indulgent persons, they were overlaid with a thin but hard veneer of formalized morality which forced decency to undergo its customary migration under

Tableau de l'Amour Conjugal, and not only did he most successfully carry it through against all the opposing forces of his time, but he produced a work which for his period was a masterpiece of scientific method, and laid a highly important foundation stone in the literature of possibly the most fundamental study of humankind: sexology. We salute Nicolas Venette as the scientist, the sexologist, and the man.

Of his book, hereafter translated, little need be said here as it may be read and judged on its own merits; a test it has most successfully been meeting for some 250 years. It appeared in its first form in 1688 as *Tableau de l'amour considere dans l'estat du mariage,* published "A Parme. Chez Franc d'Amour." In subsequent revised editions its title became changed to *De la Generation de l'homme, ou Tableau de l'amour conjugal,* and later to *Tableau de l'amour conjugal, ou Generation de l'homme,* but it is by the first portion of this last title that this famous work is most commonly known. It would probably be impossible to discover exactly how many editions this book has gone through. First published in 1688, by 1712 it was already in its 9th edition. There was a further edition put out in Amsterdam in 1745, another in 1778, and an edition was put out in Paris at least as recently as 1924.

It is to be marveled at that so important and famous a book that has had such tremendous circulation in its own language, has had no adequate and readily accessible English version. True, in the early 18th century a couple of translations of it were brought out in England, but these were stilted, flamboyant, and incomplete, which did Venette but poor justice and are today practically un-

obtainable, the few extant copies being exorbitantly priced collectors' items.

This deplorable lack we have attempted to remedy in our present translation. The rendering is completely literal, without gloss or excision. We have purposely retained as much as could be brought into English of the quaint archaic phrasing and typically Galic circumlocution, feeling that a rendering into present colloquial English might not be nearly so congenial to the spirit of this work. We have appended a few notes to explain obscure technical points that might trouble the average reader, but we have presumed no comment where Venette's own logic and reason will serve the diligent.

A word as to Venette the man, and we have done. He was born at La Rochelle in 1633, and died there in 1698. He was a Frenchman, a doctor of medicine, and a member of the college of physicians of his town. Of his personal life we know not a great deal more. Besides the present volume, he left works on scurvy, the mineral waters of La Rouillasse, urinary calculi, the pruning of trees, the nightingale, and a translation of Petronius—none of which, however, achieved anything remotely resembling the fame and wide currency of this, his outstanding production.

A. F. NIEMOELLER

St. Louis, Mo.
September, 1947.

Preface

Were not the books of the ancients which treat of love unfortunately lost, either through the malice of men or the injury of time, we without a doubt should have through their reading augmented our observations on the generation of man and through this we should have put an end to the just complaints of the illustrious Tiraquel.

But although we are lacking these, we have, it seems to me, through our own experience and that of our friends enough information to make a large volume on the orders which nature has prescribed to us for the production of man, without our having recourse for this to the thoughts of the ancients.

Nature, which is only God himself, or more properly His divine providence spread through the universe, will furnish us with ample information on this matter without searching elsewhere. Consequently, we shall follow her precepts and we shall obey her decrees; but, as truth is an attribute which is inseparable from her, we shall here disguise nothing in order that Nature and Truth, joined together, may be the two guides to conduct us throughout the whole of this work.

We shall therefore discover the secrets of Nature, and we shall make known to the eyes of all everything most truthful and most hidden that there is in the story of the generation of man.

I well know that everyone has not the strength of soul to consider such a thing and admirable work; that amongst men there are a great many weaklings and over-scrupulous who make scandal of all that is not according to their taste and who are forever complaining when everyone is not of their sentiments. The naked truth has no charm

for them; it horrifies them if it is not disguised. They would that it be masked so as to be beautiful; and, as if they were not even men, at the least allurement of love they are taken aback, are offended, cry out, take alarm, and flee.

The first men were quite otherwise than we: they were much stricter and much more reasonable than we are. Their nudity caused them no disordered emotion. Nature and reason were the mistresses of their amorous impulses and love itself, imperious as it may be, seemed to obey their orders when they set themselves against it in any degree. They regarded a woman as a statue when it was not permitted to love her, but if by chance love warmed their heart then their reason and strength of soul managed their passions so expertly that they were able adroitly to make certain of its charms. Nudity of a man or a woman made no more impression on their soul than formerly did the girls of Lacedaemon make on the mind of the people when they danced stark naked in a cross-roads without being covered by anything more than the public virtue.

But this strength of soul is today banished from our provinces, and it seems that it is preserved only among the savages who, in this respect, are much less savage than we.

When I consider the blindness of man and the contraries which bring on his misery, I go into a rage to see him in that state. From this I am amazed that despair does not prompt him to become informed about himself and to know from whence he comes and how he is made. I ask him if he is better instructed than I on the parts which compose him and on the material from which he has been engendered: and from his conversation I know

that on this we are, the one as much as the other, extremely ignorant. We both look about us and we see people who in this respect have no more information than we. By chance we find a man who instructs us in the principles of generation, who shows us the parts, clarifies for us the actions, and makes us understand the order that God has given men for multiplying their species in marriage, and the misfortunes which occur from the taking of excessive pleasures in them. Does this ma.. with whom I converse feel resentment for knowing himself and his origin, does he insult the person whom he instructs in the admirable design of Nature for the generation of man? As for me, I see that they are the commandments and orders of God, and I admire them and submit to them.

I confess that we have been brought up to feel repugnance in naming the natural parts of either sex, which we have called *shameful* although Moses denominated them *holy,* since it was not permitted a woman to touch them without having her hand cut off; and we are accustomed to feeling horror for their actions, as if God, according to the thinking of St. Thomas of Alexandria, had not made them and as if divine and human laws did not permit us to use them.

We know that one may speak of the most shameful and abominable things without injury to propriety, so long as one speaks in a way to gloss over the condition in which persons are when they are committing them, or through his decorum shows that he envisages them with pain and that he communicates them to others with all the niceties of discretion. Presenting the most infamous things under this veil of horror makes them be regarded as crimes, if they signify the thing rather than the action itself, because each thought expressed having two sorts of signifi-

cation, one of its own and the other accessory, it is considered in different senses. Thus a thing may be infamous or honest, forbidden or permitted. These accessory ideas are not always attached to words by common usage; they must be referred to those to which they are useful, and a book should be read under this condition. For words being only sounds and things being in themselves indifferent, neither the one or the other is shameful; and it is an affliction and weakness of soul to be scandalized by them. It is thus that St. Augustine employed them when he said that, if there was some lewd person who read what he had written on the pleasures of love in marriage, it would condemn his own turpitude rather than the words of which he had been obliged to make use to explain his thoughts on the generation of man; and he adds that he hopes that the chaste reader and sage listener will readily pardon him the manner of speaking of which he has made use to explain himself on this matter. It is also in this manner that the Apostle used them when he spoke of the horrible crimes of the men and women who had altered the natural use of their parts to that which is contrary to the laws of Nature.

He who knows what the world is regards everything with indifference; and, in imitation of the sun, he can be stained by nothing, however dirty it may be. If by chance this book falls into his hands he will read it without scruple and he will admire secret laws that God has given Nature for the perpetuation of the species of man.

But because it is through love that we are engendered and because love, which the Scriptures name *charity*, according to the opinion of St. Jerome, is the strongest of all the passions, in it will be found something to handle

cautiously and to tame, even when it shall be constrained: so much so that I doubt that this book may be able to be of great help to some persons, even to those of outstanding virtue.

A young man, then, will understand from it of what temperament he is, what disposition he has toward continence or marriage; he will learn at what age he ought to marry in order not to weaken himself in his early life and to live long and with pleasure; in what season and at what hour of the day he can make, without inconvenience, healthy and intelligent children who will one day be the honor and glory of their father and the support of the State. But because young men think only of sensual pleasure when they marry, they shall here see depicted the incurable distresses brought on by the excessive pleasures of marriage, so that before having proved the misfortunes that they cause us, they may avoid them and at the same time preserve themselves against them.

An old man will here find the age to which he may marry and, if he has plans for procuring heirs through he marriage, he will here see how he ought to comport himself with a wife in order to have children, and also how in the coldness of his age he ought to arouse himself with her without running any risk of affecting his health or committing any fault against the maxims of religion.

The theologian, the casuist, and the confessor will here learn the true causes of the validity and the dissolution of marriage, the vices that are there to be met with, and even the sins that may there be committed amongst the permitted sensual pleasures. For herein we examine with a great deal of care all that which is opposed to generation and consequently all that which is contrary to

the decrees of God, to the laws of marriage, and to the intention of the Church.

A judge will here find some difficulties of law and medicine, which the jurisconsults have never sufficiently cleared up, established and decided so plainly that hereafter he will himself know how to distinguish the true causes of impotence in a man and sterility in a woman and will not allow himself to be deceived when there shall be presented before him supposititious children. This science in itself is not above suspicion since a doctor, surgeon, or midwife, to whom ordinarily recourse is had in such matters, may be won over either through complaisance or interest. Here also will be noted the faults which may cause divorce between married persons, the age at which one begins to engender, that at which one finishes, and the signs which can truly indicate pregnancy. Here will be seen if Nature has fixed for women a time for childbirth; if charms, magicians, or demons are able to hinder married persons in consummating marriage. Finally, here will be learned if hermaphrodites and eunuchs ought to get married and if they are able to beget children.

The philosopher and the doctor will here find, it seems to me, something to satisfy them in reading of some discoveries I have made on the natural parts of woman and the new conjectures I advance on the place of the conception of men and on the causes of menstruation and of milk in women, and in a quantity of other matters that have not been at all well explained before this.

A wife will learn from this book how to govern her amorous activities and to take care of the reputation of her daughters. Here she will see which temperament is best suited for the cloister or for marriage in order to commend the one or the other state to her children, who

afterward will not despair through having embraced a state for which they were not fitted. Here she will gain the knowledge of how she ought to do her duty toward her husband and the consideration she should have for him when she loves his health and is not slave to her passion.

A girl will be instructed in advance on all the disorders that love can cause, without first testing them out herself; for, as the bonds of marriage are indissoluble, it will be desirable that all girls know, before being married, the pains and vexations that are to be endured in it.

Even an atheist, who will read this book attentively and who without prejudice will observe all the measures taken by Nature in the actions and formation of man, will herein find that to change his viewpoint. And I feel assured that there is no book nor reasoning that will bring him to know God more clearly than what I have written on the generation of man.

A debauchee will here come to know what vexatious afflictions and incurable maladies a disordered love causes; and after having made some serious reflections on this he will here find remedies, either for opposing the violence of love, for considering his health, or for being more restrained in the future.

It is to be hoped that the reader, of whichever sex he may be, may have an ordered mind and know what love and the world are; in addition, that he may be neither libertine nor lewd. I shall even desire that he be of a reasonable age in order to be of a condition to profit from the book.

We can, then, regard the portrait of love, which I have done after nature, for the purpose of avoiding those of its

faults and crimes which I have there pointed out. I have intended to reform the morals of the libertines and to show to the wise the versatility of love for distraction, and most of all how to preserve their health and to constrain them to choose the most assured course for generation without abuse.

Now, should we admit the complaints that are made us, we would have ground to accuse the One who has formed the natural parts of both sexes, and it likewise would be possible to blame Him who has presented us with the vine since we so easily get intoxicated from its juice. For if we weigh the benefits and gifts of Nature by evil uses of those who employ them, in truth we shall forever be taking them in bad part.

We shall then be reduced in this extremity to suppressing the major portion of old and new books. We shall banish from our libraries Catullus, Juvenal, Horace, and even Virgil, all who so agreeably converse with us on love.

And Father Sanchez, the Jesuit, would not be exempt from blame, he who has done a large volume on the most secret of things that transpire between married persons. One would no longer read St. Augustine, St. Gregory of Nice, nor Tertullian, who speak of conjugal love in terms that I would not dare to translate into French without paraphrasing them.

Further, touching upon medicine and anatomy, I should place above all things the book on *Popular Errors*, by Joubert, which treats of the actions of the parts of the sexes and which he readily dared dedicate to Marguerite of Navarre, grandmother of Henry the Great, of glorious memory; that of Ambroise Pare and du Laurens who treat of the generation of man, and that of M. Mauriceau

who speaks of women in childbirth, along with pictures which seem indecent and lewd. So long as there will openly be sold a book which treats of the passions of the soul, which adroitly insinuates into our hearts the most tender emotions of love; or the books of Bodin, the advocate, and of Delande, adviser to the Parlement of Bordeaux, which make plain to us the lewdnesses and abominations committed by the sorcerers at the *Sabbat;* or the romance of the *Rose*[1] and of the *Bourdon,* of which Jean de Meun was the author, which will still be found in our libraries; or the pieces of verse, the satires and comedies of our poets on public sale; or for that matter the sanest of all the books that may be found in the hands of almost all the women, I cannot believe that it might be found evil that I have discussed in my own language all the questions which compose this book.

I know that there are some persons so susceptible to love that they cannot behold any amorous object nor read any book that treats of it without being moved even to the extent of crime by this passion. These persons I counsel to flee the conversation of men or live in the desert and solitude in order to see nothing which shocks them or hear anything that may be said regarding the generation of man.

Now if, through effort or skill, we might be able to abstain from activities of love or to keep others from them, I confess that I should do wrong to expose this book to the eyes of everyone. But since love is a passion which strongly affects us, often without being able to defend ourselves against it, it seems to me that one ought rather to praise than blame a book which teaches modera-

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[1]Le Roman de la Rose.

tion and the preservation of health by guaranteeing oneself against the versatility which it always employs to mistreat us; for it is part of human prudence, which the Fathers of the Church have termed *prudentia carnis,* to preserve the health through moderation in the pleasures of marriage.

It is not always books that teach us what we ought not to know; a bad disposition and unchaste examples and conversation will often work as much evil.

I have no doubt, moreover, that if this book should be judged only by the title of its chapters it might appear impertinent and lewd to some persons who have been badly reared, who have bad inclinations and a mind turned toward evil. But if it is opened to be read and if the plan that I have had in composing it is judged without prejudice, through it one will doubtless worship the divine Wisdom which has had our hearts taken over by the means of love for the perpetuation of our species.

But everyone is not capable of judging my book well. It is like a picture which all sorts of persons are not capable of understanding. In order to judge it well, one must be acquainted with the science of painting, and then put himself at the proper point for viewing; for there is but a single and unalterable position from where it may be seen well. Those who judge it often do not put themselves there. They place themselves too near, too far, too high, too low, and thus they judge of it badly. Furthermore, ignorant persons are not at all capable of judging of it, nor are those who have looked at it in the light of hearsay or prejudice. There are, therefore, three sorts of people who will set up to be its judge. The first, entirely ignorant, will say, along with the rest, that it is worthy only of being burned at the

hands of the executioner. The second, the savants, will judge it well, or will say not a word about it, and will admire in it the order of Nature and the precepts of God for the generation of man. Finally, the third, the half-savants, who are of much greater number than the other two, will give it out that my book is pernicious. They will put on knowing looks, upset everyone, and judge far worse than the others. They are jaundiced, and will say that it is I that is smeared with yellow. In truth, everyone has not the right to judge. For this it is necessary to have a straight mind, good taste, and good sense, and few persons have this: this is testified to by what Quintillian has pointed out to us about men of his own time who esteemed Lucretius above Virgil, although the first when compared to the other does not even merit the name of poet. Finally, in defense of my book I should wish no more than the apology made for that of the Jesuit Father Sanchez, who has written of marriage as I have: and then it will have been well defended.

What preacher of the Church has exhorted with more moral zeal and force than I for the moderation of the pleasures and the avoidance of the voluptuousnesses of marriage? Who has been more opposed than I to excesses in love, and who has taught surer means for protecting himself from its allurements? One has only to read art. 2 of chap. 3 of part one; chaps. 1, 2, and 6, arts. 1 and 2 of chap. 8 of part two; and chap. 1 of part three of this book, and at a number of other places, to find out if I urge men toward vice rather than toward virtue.

How badly one judges when he judges things only by the outside or by appearance! If we consider how Lot amorously caressed his daughters; how Samson performed miracles, which St. Jerome literally termed fables;

how David committed adultery; how Tamar prostituted herself; how Hosea got married unchastely through the counsel of God; how *Holla* and his sister ran after lewd persons, should we not believe that these are indecent, abominable things and unworthy of being placed in Holy Scripture?

In addition I beg that my book he not judged without having read it, as formerly was done with the books of St. Thomas and of Francis Bacon, chancellor of England, who reckoned to be magicians solely on the title of their books, and finally that one does not stupidly permit himself to be led either by the persuasions of my enemies or the malignity of ignorant people: for there are in the world a great many more idiots who halt before grotesque paintings than there are wise men who apply themselves to contemplating the beauty of Nature. After all, if they find it bad, I consent to their bla.. g it and even to their having it burned, as did the emperor Nero with the satires of Fabricius Veiento, and the Roman orator with the books of Cremurius Cordus.

But why should I be astonished if my book is so maliciously criticized? Have not the most perfect works been criticized? Against these same works there have been the most intense envy and hatred. Has it not been said that Homer often slept and that he was full of faults; that Demosthenes scarcely satisfied those who read him; that Cicero was a compiler from the Greeks, and they have even indicated all the passages, and that he was timorous, slack, dull, too copious, and too sluggish in his exordia, too tiresome in the cadence of his periods, and finally too slow in arousing himself; that Seneca the elder had no unity and that his discourse was but as sand without lime; that Pliny the historian swallowed all his

opinions and digested nothing; that Virgil had little mind and was a usurper of the thoughts of others; that Ovid was too wordy; that Horace was too indecent and that he had written verse in prose; that St. Ambrose was the crow of the fable, and that his *Commentaries* of St. Luke were but idle stories and trifles? Finally, envy is not content simply to attack the reputation of persons it hates, but also of those who are contrary to it.

Be that as it may, in fashioning this book I had quite resolved to have as many judges as readers. To me this appears neither onerous nor unjust.

Finally, I have not been able to do otherwise, regardless of such discretion as I may have been able to bring into my discourse. I shall be highly satisfied if a smaller number of learned and well informed persons esteem my book. I should always prefer them to a coarse multitude which often is a poor interpreter of truth. This doubtless is what the wise man wished to say when he left us through writings that *the opinion of the people is often the opinion of fools*, and what is to be implied to us by Horace, who begins one of his most beautiful odes with these words: *Odi profanum vulgus et arceo.*

If, dear reader, you should dare
To criticize my phrasing blunt,
Please make haste to show me where
You could be more elegant.
Regard who will with sober air these words so innocent
No crime is it to make attempt to paint
Those tender thoughts Nature would to us acquaint:
Each finds in him these same emotions needing vent,
And who would stifle them has lost good sense.

—Petronius